BEFORE THE STATE PERSONNEL BOARD
IN THE MATTER OF

TRACEY BROWN-EDWARDS,          )
                        ) Appellant,
                        )
v.                            ) CASE NO. 22-17-RCS
OFFICE OF THE ATTORNEY         )
GENERAL,                      ) Appellee.
)

RECOMMENDED ORDER TO THE STATE PERSONNEL BOARD

This recommended order arises from an employment termination action by the Office of the Attorney General (hereinafter “AGO”). AGO terminated the employment of Tracey Brown-Edwards (hereinafter “Brown-Edwards” or “the employee”) after she violated two AGO policies. The evidence presented by AGO during the hearing showed that Brown-Edwards violated the AGO Use of Recording Devices Policy and the AGO policies that pertain to the caring of official documents and maintaining confidentiality of information; and therefore, its decision to dismiss Brown-Edwards should be upheld by the State Personnel Board.

A hearing was held on April 28, 2022, at the State Personnel Department in Montgomery, Alabama. Tara Hetzel, Esq., appeared as counsel on behalf of AGO. Joseph Mitchell McGuire, Esq. appeared as counsel on behalf of Brown-Edwards.
At the beginning of the hearing, AGO introduced into evidence exhibits consecutively marked as AGO’s Exhibits 1 - 22. Brown-Edwards introduced forty-three additional exhibits into the record marked as Employee’s Exhibits 1 - 43. The undersigned informed the parties that Brown-Edwards’ personnel file at the Alabama State Personnel Department is included in the record as evidence in this cause.

AGO called as witnesses:

(1) Bruce Lieberman, Medicaid Fraud Control Unit Division Chief;

(2) Angelique Pugh, I.T. Systems Specialist; and

(3) Clark Morris, Assistant Chief Deputy, Criminal Division.

Brown-Edwards called as witnesses:

(1) Wanda Desiree Hall, Nurse Analyst for the Medicaid Fraud Control Unit; and

(2) Kim Dyrendahl, Personnel Manager for AGO.

Brown Edwards testified on her own behalf.

I. PROCEDURAL HISTORY AND CHARGES

AGO hired Brown-Edwards in August 1998 as a “Clerk.” In February 1999, Brown-Edwards was appointed to “Public Protection Specialist.” In

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1 Due to the sensitive nature of, and/or the privacy protected material contained in portions of some exhibits, Employee Exhibit 4, pages 14-21, pages 39-47, and pages 49-51 (the remaining pages were admitted into the record except pages 61, 68 and 101); Employee Exhibit 8, page 137 (pages 6-112, 114-115, 119-130, and 133-212 were not admitted into the record); Employee Exhibit 9; Employee Exhibit 10; Employee Exhibit 11; Employee Exhibit 12; and Employee Exhibit 18 are hereby placed UNDER SEAL and are not available for public inspection without appropriate Court Order, an Order from the Administrative Law Judge acting under the authority of the State Personnel Board, or an Order of the State Personnel Board.
September 2005, Brown-Edwards was appointed to “Attorney General Special Investigator.” In January 2008, Brown-Edwards was appointed to “Special Agent” and worked in the Medicaid Fraud Control Unit (“MFCU”). Brown-Edwards remained in that classification until her dismissal on February 16, 2022. See February 16, 2022, dismissal letter (“dismissal letter”) signed by Attorney General Steve Marshall.²

In the dismissal letter, Marshall stated:

...  

On February 2, 2022, you were placed on mandatory annual leave and given a pre-dismissal letter notifying you of the charges brought against you for recording me and other members of the Office of the Attorney General and for taking documents from the investigative files of the Medicaid Fraud Control Unit in which you gave them to your personal attorney.

You were afforded the opportunity to be heard on the charges against you at a pre-dismissal conference on February 9, 2022, before Clark Morris, Associate Chief Deputy, Criminal. At this pre-dismissal conference, you stated that you did, in fact, record me and other members of this office; however, the recordings were made outside of this office in “public” places.

...

When addressing the charge of taking documents from the investigative files of this Office, you further stated that you did not print the investigative documents from ProLaw but took the documents from a table near the copier where staff place documents that were not picked up immediately after printing. You explained that these documents were left in a common space where our cleaning staff and employees of other divisions had

² See AGO’s Exhibit 3.
the same access that you did. You specifically stated that you
took these documents and gave them to your attorney to assist
with proving your case of discrimination.

The documents that you gave to your attorney were part of
the investigative files of the Medicaid Fraud Control Unit, which
is a criminal investigative division. In addition, certain
privileges protect these documents from being released to the
public – the work-product privilege, the qualified law
enforcement privilege, and the statutory protection of Ala. Code
12-21-3.1. Your actions have violated these privileges.
Furthermore, your actions have placed protected personal
information, such as banking information, dates of birth, home
addresses, Medicaid numbers, and personal phone numbers that
this office is to maintain into the hands of your attorney for your
personal use. Your actions cannot and will not be tolerated.

Based on the foregoing charges, and serious violations of
policies and State Personnel Board rules and after careful
consideration of your response at the pre-dismissal conference, I
am ordering your dismissal effective date of this letter. ...

In the AGO’s short statement of facts, they reiterated essentially the
same facts, charges and rule violations as indicated in Brown-Edwards’
dismissal letter.³

Brown-Edwards timely appealed her dismissal to the Alabama State
Personnel Board, pursuant to Ala. Code 1975, § 36-26-27(a). On April 28,
2022, the undersigned conducted a de novo hearing (“the hearing”), at which
ore tenus and documentary evidence was received.

II. FACTUAL BACKGROUND

³ See ALJ file.
Having reviewed the documentary evidence and having heard the testimony presented at the hearing and having observed the witnesses' demeanor and assessed their credibility, the undersigned finds the greater weight of the evidence supports the following findings of facts.\(^4\)

**A. Employee’s Personnel File\(^5\)**

Brown-Edwards’ annual performance appraisals ("APA") while at AGO reflect:

<table>
<thead>
<tr>
<th>Date Ending</th>
<th>Total Score</th>
<th>Category</th>
</tr>
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<tbody>
<tr>
<td>01/21</td>
<td>35.0</td>
<td>Exceeds Standards</td>
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<td>01/20</td>
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<td>01/19</td>
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<td>34.4</td>
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<td>01/13</td>
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<tr>
<td>01/10</td>
<td>34.5</td>
<td>Exceeds Standards</td>
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<tr>
<td>03/09(^6)</td>
<td>35.6</td>
<td>Exceeds Standards</td>
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<tr>
<td>01/09</td>
<td>35.6</td>
<td>Exceeds Standards</td>
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</tbody>
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\(^4\) All references to exhibits and testimony are intended to assist the State Personnel Board in considering this recommended order and are not necessarily the exclusive sources for such factual findings.

\(^5\) See generally SPB Rules 670-X-18-.02(5) and 670-X-19-.01(1)(b) (employee’s work record, including performance and disciplinary history, and length of service considered in dismissing employee). On September 13, 2005, Brown-Edwards was appointed to A.G. Special Investigator, an unclassified position. Therefore, Brown-Edwards does not have performance appraisals from 2006 through 2008. She was appointed to Special Agent, a classified position, in 2008 and had performance appraisals from that point forward.

\(^6\) Brown-Edwards’ Probationary Performance Appraisal for Special Agent.
Brown-Edwards’ prior disciplinary history at AGO includes the following disciplinary action:

Written Warning on July 2, 2004, for using her state telephone for personal reasons that resulted in monetary charges to the AGO.

B. SPB General Work Rules Forming the Basis of the Charges

Rule 670-X-19-.01 provides, in part:

... 

(a) Violations that normally result in disciplinary actions of increasing severity:

... 

4. Failure to perform job properly.

... 

8. Violation of specific department rules.

... 

(b) More serious violations that may result in suspension or discharge on the first offense.

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7 Brown-Edwards Probationary Performance Appraisal for Public Protection Specialist.

10. Serious violation of any other department rule.

13. Conduct unbecoming a state employee.

AGO's Employee Policies and Procedures Handbook states, in pertinent part:

**Misconduct of Violence in the Workplace**

The workplace is a gathering of people where basic safety and social order must be maintained. Further, supervisors must make decisions and direct employees to accomplish legitimate assignments. All employees must behave in a moral, ethical, and business-like manner.

**Expected Employee Behavior**

Employees shall comply with the policies and operating procedures of the Office and their divisions.

Employees must act in a manner that is consistent with generally recognized professional conduct and ethical principles.

**Care of Official Documents**

All records and documents in the custody of Office employees are for official purposes only. It is unlawful to remove, conceal, alter, mutilate, obliterate, or destroy records or documents, or to remove or attempt to remove with the intention of performing any of the above actions. Employees must not remove records and documents from the
official files without approval from the proper authority. Disposal or
destruction of records and documents is to be made in accordance with
established procedures. See Administrative Records Retention in the
General Information section of this handbook.

Employees shall be held responsible for the loss, disappearance,
or theft of official documents when attributable to negligence or
carelessness. Recovery of documents may not necessarily mitigate the
effects of the loss. It is improper for an employee to make a copy of
any Office document for the employee’s personal use.

...  

Confidentiality of Information

When a question arises about whether an item of information
may be disclosed, the employee shall discuss the facts with his/her
supervisor.

Employees acknowledge they fully understand the importance of
information confidentiality and the penalties provided for violations, by
signing the Employee Policies and Procedures Handbook Receipt and
Acknowledgement statement (see Appendix). After the statement is
signed, it is placed in the employee’s personnel file.

...

Use of Recording Devices

All employees are expected to conduct themselves in a
professional and responsible manner. All employees should know
they are free to exchange information and express ideas in an
environment of trust, free from fear that someone is baiting a trap for a
misspoken work. Although employees must use recording devices in
the performance of certain duties, such as witness interviews,
depositions, etc., any use of recording devices by Office employees to
record conversations or actions with supervisors or co-workers without
their knowledge is specifically prohibited. The Office considers audio
and/or video recording by any employee of another employee without
said employee’s knowledge to be a violation of Office work rules.
Any employee violating this rule will be subject to disciplinary action.
up to and including termination.

... 

**Ala. Code §12-21-3.1(b)** states, in pertinent part, "... law enforcement investigative reports and related investigative material are not public records. Law enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure."

... 

**42 CFR §1007.11(f)** states, in pertinent part, "[MFCU] will guard the privacy rights of all beneficiaries and other individuals whose data is under the safeguards to protect sensitive information and data under the Unit’s control."

...

C. Facts Forming the Basis of Dismissal

the Middle District of Alabama, Northern Division.9

On November 12, 2021, Brown-Edwards was deposed in her lawsuit against AGO. During her deposition, Brown-Edwards admitted she recorded conversations between herself and the following AGO employees: Marshall; Crenshaw; Shockley; and Lieberman.10 Brown-Edwards also recorded a conversation she had with AGO Personnel Manager Kim Dyrendahl ("Dyrendahl"), and she admitted she recorded a phone conversation she had with AGO Special Administrative Assistant, Charla Doucet ("Doucet"). Brown-Edwards acknowledged she recorded them on a cell phone at various times and did not notify the AGO employees she was recording the conversations.11

Brown-Edwards also acknowledged she removed confidential MFCU case file information from the AGO offices and gave those documents, without permission, to her private attorney who represented her in her federal lawsuit.12

Brown-Edwards testified at the hearing. She acknowledged that she

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9 See Employee Exhibit 41. The U.S. Middle District Court has jurisdiction on those issues and therefore, they are not addressed in this recommendation.

10 Employee Exhibit 20, page 11.

11 See also Employee Exhibit 20, pages 207-208.

12 Testimony of Brown-Edwards. See also Employee Exhibit 20, page 169-170.
signed a confidentiality of information form which prohibited dissemination or other disclosure of any privileged, confidential, sensitive, or other information obtained from the AGO office. Brown-Edwards also received and agreed to read and follow the AGO Employee Handbook on multiple occasions throughout her career.

Brown-Edwards explained during her deposition and testimony that she did not record any of the AGO employees within the AGO offices. Brown-Edwards contended she recorded the employees at various locations such as a funeral, a coffee shop/deli, and in a parking lot. Brown-Edwards contended her use of a recording device in public would not be a violation of AGO policy. Brown-Edwards was asked to produce a copy of the recordings during the discovery phase of her federal lawsuit. Brown-Edwards attempted to locate the recordings but could not find them.

Brown-Edwards also explained that the documents she removed from the AGO offices were case file information left on a table in the MFCU office area by the copier where anyone could see them. Brown-Edwards believed the documents were on the table for days or weeks. Brown-Edwards

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13 AGO Exhibit 1, page 206.

14 AGO Exhibit 1, pages 163, 168, 193 and 202.

15 Evidence in the record showed that Brown-Edwards was well aware of the confidential nature of case files. In AGO Exhibit 19, Brown-Edwards wrote an email to Lieberman concerned that someone was in her office over the weekend. She indicated she locked her door on Friday and it was open on Monday. Brown-Edwards stated, “I don’t know why anyone would need to be in my office while I am out because I
believed her dismissal from AGO was retaliation for her complaints to the EEOC and her federal lawsuit.

Lieberman testified at the hearing. Lieberman described the work of the MFCU. The MFCU prosecutes and defends cases on behalf of the State of Alabama. The case files contain confidential information that is regulated by federal regulations as well as AGO policies. Lieberman described the office area of the MFCU. It is a secured area, set apart from other offices within the AGO, with a separate door. Only MFCU employees have access to the area, as well as Lieberman’s supervisor, Assistant Chief Deputy Clark Morris, the I.T. department and the cleaning crew during certain hours. Lieberman acknowledged during his testimony that he was aware of three other AGO employees who were fired for violating one or both of the infractions Brown-Edwards violated. Special Agent Howard “Gene” Sisson, Attorney Henry “Sonny” Reagan, and Special Agent William “Bill” Summers, all white males, were dismissed from the AGO for the same rule violation/s.17

Lieberman also testified about the ramifications of Brown-Edwards

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16 The confidential information includes dates of birth, Medicaid participant and provider numbers, home addresses, and personal phone numbers.

17 Sisson appealed his dismissal to the Alabama State Personnel Board and his dismissal was upheld. Sisson v. AGO, 15-21-JJW.
removal of confidential information from the MFCU offices. Lieberman had to notify the United States Department of Health and Human Services, about the data breach and also had to include it on the annual recertification which determines whether the AGO will receive federal grant funds to offset the cost of investigating Medicaid fraud.\textsuperscript{18}

Lieberman testified he did not know he was recorded by Brown-Edwards until sometime during the Spring of 2021. Lieberman found out during the course of the federal litigation. Lieberman testified he heard Brown-Edwards recorded him at a deli, which he believed was a coffee shop, and at a funeral. Lieberman also testified he answered questions in his official capacity during his deposition about case sensitive matters in response to questions posed by Brown-Edwards’ attorney. The information asked by Brown-Edwards’ attorney came from the confidential files removed from the AGO by Brown-Edwards.

Lieberman also testified he trusted the cleaning crew and explained that employees are allowed to remove confidential information from the office while working specific cases. For instance, employees may take documents on trips, keep them in their hotel room and vehicle. The prohibition was against disclosure of those documents, not the legitimate business use of those

\textsuperscript{18} AGO Exhibits 20 and 21.
documents.

Angelique Pugh ("Pugh"), an I.T. Support Specialist for AGO, also testified at the hearing. Pugh testified that she was asked to review Brown-Edwards’ access to Prolaw software, the software AGO uses to store case file information electronically. Pugh testified that Brown-Edwards accessed case files for one of the cases she provided to her attorney on October 3, 2019, January 26, 2021, and May 5, 2021, well after the case was closed.\textsuperscript{19}

Assistant Chief Deputy, Criminal Division, Clark Morris ("Morris") testified at the hearing. Morris was in Brown-Edwards’ supervisory chain of command since August 2020. Morris was involved in the decision to dismiss Brown-Edwards from AGO. Morris conducted the pre-dismissal conference and recommended Marshall terminate Brown-Edwards’ employment with AGO for violating various rules and policies. Morris testified the AGO policy expressly prohibited Brown-Edwards from recording conversations with co-workers anywhere, including in public, without their knowledge. Morris also stated it differently by saying Brown-Edwards was also free to record employees anywhere, so long as she notified them she was recording the conversation. Morris testified all Brown-Edwards had to do was tell her co-workers she was recording them. Morris also testified about the

\textsuperscript{19} AGO Exhibit 22. The case was closed on or about April 17, 2017. The last entry into the file was on October 11, 2017.
confidentiality of case files. Morris clarified the case files in the MFCU were extremely sensitive and confidential because they contained HIPAA related information as well as personal information.

Morris was asked about Brown-Edwards’ desire to be promoted to a Special Agent, Senior position. Lieberman previously testified that there was only one Special Agent, Senior position available within MFCU. Morris testified that another Special Agent, Senior position opened in another unit, but Brown-Edwards failed to apply for that position. Morris testified she received an email from Brown-Edwards about the position, but the e-mail discussed Brown-Edwards’ concern that if Brown-Edwards was placed in that role, there would be a lack of diversity within the MFCU.20 Morris testified she read Brown-Edwards’ email but did not consider her for the open Special Agent, Senior position because Brown-Edwards did not submit an application. Morris testified that the facts support the allegations against Brown-Edwards and her employment was due to be terminated.

Nurse Analyst Wanda Desiree Hall (“Hall”) testified on behalf of Brown-Edwards. Hall worked in the MFCU with Shockley, Lieberman and Brown-Edwards. Hall testified she recalled two times Shockley’s wife, Rachel Shockley, a retired nurse, discussed case information with Hall. Hall

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20 Employee Exhibit 24.
believed Shockley discussed confidential, case sensitive information with his wife who then shared that information with Hall. Hall also recalled a time when she was part of a conference call with Lieberman, another Special Agent and a representative from an outside agency. Hall recalled the Special Agent began discussing confidential case sensitive information with the representative from the outside agency. Hall testified that Lieberman then attempted to unseal the case, which would have permitted the discussions to continue. Hall did not believe the other Special Agent was disciplined for discussing those details prior to the case being unsealed. On cross-examination, Hall admitted she did not report any of the violations she claimed she witnessed.

**Other Relevant Evidence**

The parties provided over 2,200 pages of exhibits. Many of the exhibits were discussing documents, depositions and corresponding exhibits. After a thorough review of the exhibits, it is clear that Brown-Edwards has filed various complaints throughout her tenure with AGO. Brown-Edwards met with Doucet, Marshall, Crenshaw, Morris, Lieberman and Shockley on multiple occasions to complain about certain work conditions. Brown-Edwards was well within her right as an employee to bring these complaints to those within her supervisory chain. Brown-Edwards testified she took case file information to her attorney and tried to record her co-workers in an
attempt to get relief. While this is her stated purpose, there is significant evidence that AGO was working with Brown-Edwards on her complaints. As a result of her complaints and the subsequent meetings, Brown-Edwards was moved out from Shockley’s direct supervision and reported directly to Lieberman. Brown-Edwards complained about her annual performance appraisal scores; Lieberman raised her performance appraisal scores after he started to supervise her. Brown-Edwards complained about discriminatory language used around her. In her deposition, Brown-Edwards acknowledged there has not been any racial comments made since December 2018.\textsuperscript{21} The documentation provided for this hearing showed AGO staff met with and listened to Brown-Edwards’ complaints and took affirmative steps to help resolve those complaints, in an effort to address her concerns.\textsuperscript{22}

III. ISSUE

Did AGO produce sufficient evidence to warrant Brown-Edwards’ dismissal?

IV. DISCUSSION

The purpose of the administrative appeal is to determine if the termination of the employee’s employment is warranted and supported by the

\textsuperscript{21} Employee Exhibit 20, page 230.

\textsuperscript{22} Again, the jurisdiction on Brown-Edwards’ discrimination complaint is with the Middle District of Alabama, but Brown-Edwards alleged pre-text in this action, which will be further discussed below.

“[D]ismissal by an appointing authority ... is reviewable by the personnel board only to determine if the reasons stated for the dismissal are sustained by the evidence presented at the hearing.” *Id.* at 559, quoting *Johnston v. State Personnel Bd.*, 447 So. 2d 752, 755 (Ala.Civ. App. 1983).23

In determining whether an employee’s dismissal is warranted, the departmental agency bears the burden of proving the charges warrant termination by a “preponderance of the evidence.” The law is well settled that a “preponderance of the evidence” standard requires a showing of a probability that the employee is guilty of the acts as charged. Thus, there must be more than a mere possibility or one possibility among others that the facts support the disciplinary action at issue. The evidence must establish that more probably than not, the employee performed, or failed to properly perform, as charged. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 124 (1997).

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23 The Alabama Court of Civil Appeals went further to hold: “both this court and the circuit court must take the administrative agency’s order as ‘prima facie just and reasonable’ and neither this court nor the circuit court may ‘substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” *Id.* at 559, citing Ala., Code 1975, § 41-22-20 (k); *State Dept. of Human Res. v. Gilbert*, 681 So. 2d 560, 562 (Ala.Civ.App. 1995).
117 S.Ct. 1953, 138 L.Ed. 2d 327 (1997), holding that a “significant possibility” falls far short of the APA’s preponderance of the evidence standard. See also Wright v. State of Tex., 533 F. 2d 185 (5th Cir. 1976). 24

An administrative agency must act within its constitutional or statutory powers, supporting its decision with substantial evidence. “Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ and it must be ‘more than a scintilla and must do more than create a suspicion of the existence of a fact to be established.’” Alabama Alcoholic Beverage Control Bd. v. Tyson, 500 So. 2d 1124, 1125 (Ala. Civ. App. 1986).

In the present case, AGO provided substantial evidence that Brown-Edwards violated (1) AGO’s policy prohibiting the disclosure of confidential, case sensitive information by removing case file information from AGO and giving it to her attorney; and (2) AGO’s policy prohibiting the recording of a co-worker without their knowledge. Brown Edwards’ actions also violate State Personnel Board rules, specifically Rule 670-X-19-.01(a)(4) Failure to perform job properly; Rule 670-X-19-.01(b)(10) Serious violation of any other department rule; and Rule 670-X-19-.01(b)(13) Conduct unbecoming a

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24 In Bonner v. City of Prichard, 661 F. 2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.
state employee. Brown-Edwards’ actions cannot be condoned and AGO’s decision to dismiss Brown-Edwards from her employment was supported by the totality of the evidence.

Brown-Edwards asserted some specific defenses:

1. AGO’s proffered reasons for Brown-Edwards’ dismissal were pretextual and they fired her in retaliation of her EEOC complaints and subsequent lawsuit.

The Eleventh Circuit follows a well-established framework for a retaliation claim. In Johnson v. Miami-Dade County, 948 F. 3d 1318 (11th Cir. 2020), the Court stated, “When a Title VII retaliation claim is based on circumstantial evidence, this Circuit uses the three-part McDonnell Douglas burden-shifting framework.” (citing Kidd v. Mando-Am. Corp., 731 F. 3d 1196 (11th Cir. 2013). “First, the Plaintiff must establish a prima facie case, which raises a presumption that the employer’s decision was more likely than not based on an impermissible factor.” Richardson v. Leeds Police Dept., 71 F. 3d 801, 805 (11th Cir. 1995).

In order to establish a prima facie case, the Plaintiff must show three separate factors:

First, (1) that she engaged in a statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some
causal relationship between the two events. (citing Holifield v. Reno, 115 F. 3d 1555, 1566 (11th Cir. 1997).

Second, once the plaintiff establishes a prima facie case, the burden shift to the defendant to offer a legitimate, nondiscriminatory reason for its employment decision, Richardson, 71F. 3d at 805. Third, if the defendant offers a legitimate, non-discriminatory reason for its employment decision, the burden shifts back to the plaintiff to establish that the reason offered by the defendant “was not the real basis for the decision, but a pretext for discrimination.” Id. at 806.

In the present case, Brown-Edwards engaged in statutorily protected activity, she filed multiple EEOC complaints and a federal lawsuit. Brown-Edwards ultimately suffered an adverse employment action, her dismissal from State service. Brown-Edwards relied on a short period of time between when she requested an overdue performance appraisal and her firing to show causal connection. Assuming that alone is sufficient to prove causal connection, the remainder of the analysis is set forth below.
AGO’s legitimate business reason proffered for Brown-Edwards’ dismissal was her admitted violation of AGO policies, specifically, recording co-workers without their knowledge and giving confidential, sensitive case records to her private attorney. AGO supported their position by showing that three white, male employees were also dismissed from State service for engaging in one or both of those same rule violations. Brown-Edwards argued those examples were not related because the comparators actions were more egregious. Brown-Edwards failed to show an example of an employee who committed the same or similar rule violations and was allowed to remain employed. Brown-Edwards also failed to provide any credible evidence of pre-text. Pretex is defined as “A false or weak reason or motive advanced to hide the actual or strong reason or motive.” Black’s Law Dictionary 1438 (11th Edition) The evidence in the record supports consistent discipline for the same offense(s). The evidence also indicates that AGO was willing to work with Brown-Edwards on her complaints and made positive changes in response to her protected activity.

2. AGO’s prohibition of recording co-workers is unconstitutional.

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25 Brown-Edwards alleged that she was fired shortly after she requested an overdue evaluation. The Eleventh Circuit has held, “However, even when the disparity is only two weeks, we have suggested that such proximity is ‘probably insufficient to establish pretext by itself.’” Hulbert v. St. Mary’s Health Care Sys., Inc., 439 F. 3d 1286, 1298 (11th Cir. 2006).
Brown-Edwards alleged that AGO’s policy which prohibits the recording of a conversation with a co-worker without their knowledge violates the First Amendment.

The parties acknowledge that Alabama is a one-party consent State.\textsuperscript{26} However, Brown-Edwards did not cite any legal authority that would specifically prevent AGO from having a policy which prohibits an employer, specifically, the State of Alabama in this case, from creating a policy which prohibits co-workers from recording each other. The question is whether AGO had an adequate justification for prohibiting their employees from tape recording others without their knowledge. “A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.” \textit{Pickering v. Board of Education}, 391 U.S. 563, 568 (1968). In this case, the policy in question states its intended purpose at the beginning: “All employees should know they are free to exchange information and express ideas in an environment of trust, free from fear that someone is baiting a trap for a misspoken word.”\textsuperscript{27} Furthermore, MFCU cases involve confidential, sensitive and protected material that MFCU has a legal obligation to safeguard. On the one-hand, the policy may be viewed as

\textsuperscript{26} Ala. Code §13A-11-30.

\textsuperscript{27} AGO Exhibit 5, page 38.
extremely restrictive since there is a prohibition of any recording of any employee regardless of location; however, employees are free to record each other anywhere at any time so long as they inform their co-worker of their intention. The policy is not overbroad, and is intended to encourage, not chill speech.

Many jurisdictions have similar prohibitions. As once Court said, “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” Ross v. Clayton County, 173 F.3d 1305, 1311 (11th Cir. 1999). The limitation on secretly recording supervisors in a law enforcement environment was addressed in Douglas v. Dekalb County, Georgia, 2007 WL 4373970. In Douglas, the Court stated:

The same goes for secretly taping one’s supervisor. Candor, trust, and confidentiality may be undermined where fellow police officers must fear the prospect of having their statements secretly recorded. Regulations prohibiting such conduct further the goal of ensuring loyalty within a governmental entity, especially in police departments. See Campbell v. Towse, 99 F. 3d 820, 829-30 (7th Cir. 1996) (“It surely cannot be doubted that individuals who work in the highest echelons of the command of a police department must be assured of the loyalty of their immediate subordinates, as these subordinates are entrusted with carrying out their orders, at times under the most trying conditions.”); Oladeinde v. Birmingham, 230 F. 3d 1275, 1293 (holding that plaintiff’s First Amendment interest did not outweigh police department’s interest in: maintaining order, loyalty, morale, and harmony”).
AGO is a law enforcement entity. Both Lieberman and Morris stated during their testimony they are prosecutors. They are tasked with the responsibility of investigating and prosecuting Medicaid fraud. Their policy helps to maintain an atmosphere of trust. Brown-Edwards violated that trust when she attempted to use her Title VII complaint status to justify breaking clear AGO policy.

Filing a Title VII complaint does not insulate an employee from following their employer’s rules and policies. Other jurisdictions have dealt with a similar issue: In Jones v. St. Jude Medical S.C., 504 Fed.Appx. 473 (2012), the Sixth Circuit Court found that the employee’s secret recording of conversations with other employees, management, or clients did not constitute protected activity under Title VII and therefore, the employer was able to dismiss the employee for violating the employer’s no-recording policy. Interestingly, the Court noted that they did not see why the employee felt the need to violate the no-recording policy since other methods that complied with the employer’s rules could have been used.

Also, In Argyropoulos v. City of Alton, 539 F. 3d 724 (2008), the employee secretly recorded conversations with her supervisors in an attempt to obtain evidence of sexual harassment and discrimination. The Court held that the employee’s recording of conversations, which was a significant factor in deciding to terminate her employment, was not direct evidence of
retaliation. The Court also stated that Title VII did not "grant the aggrieved employee a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination." Id. at 734

3. Other employees engaged in similar conduct and were not disciplined.

Brown-Edwards alleged that every AGO employee who discussed case files during their deposition in the federal lawsuit committed the same infraction as Brown-Edwards, disclosing confidential case files, and they were not disciplined. Brown-Edwards removed confidential, sensitive case files from the AGO and gave them to a non-privileged third party, her personal attorney. Once Brown-Edwards' attorney had the case files, he then used information from those case files during depositions. The AGO employees responding to questions did not disclose confidential information, but rather they were responsive to questions asked by Brown-Edwards' attorney who already possessed the case information discussed.\(^{28}\)

Brown-Edwards also alleged that Lieberman, another AGO employee and Shockley were guilty of the same or similar breaches of confidentiality. Brown-Edwards based these allegations on the testimony of Hall. Hall admitted she never reported the breaches or what she witnessed. Based upon

\(^{28}\) See Exhibits placed under seal.
the evidence presented, Morris and Marshall were the AGO employees that determined discipline in this matter. They cannot be held responsible for rule violations that occur outside their knowledge and are not reported.

The undersigned considered mitigation. No grounds exist to support mitigation in this matter. Wherefore Premises Considered, the undersigned recommends to the State Personnel Board that Brown-Edwards’ dismissal be UPHELD. ²⁹

Done this the 24th day of June 2022.

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²⁹Having found sufficient evidence to uphold the dismissal, any/all remaining issues are moot.
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